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Recommended Citation

Jack M. Beermann, *Privatization and Political Accountability*, in 28 *Fordham Urban Law Journal* 1507 (2001).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/1995

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PRIVATIZATION AND POLITICAL ACCOUNTABILITY

*Jack M. Beermann**

INTRODUCTION

This article is an attempt to draw some general connections between privatization and political accountability. Political accountability is to be understood as the amenability of a government policy or activity to monitoring through the political process. Although the main focus of the article is to examine different types of privatization, specifically exploring the ramifications for political accountability of each type, I also engage in some speculation as to whether there are there situations in which privatization might raise constitutional concerns related to the degree to which the particular privatization reduces political accountability for the actions or decisions of the newly privatized entity. Although some states have constitutional constraints along these lines,¹ current federal constitutional law does not address directly the constitutionality of privatization along political accountability lines. However, if a majority of the Supreme Court becomes convinced that a particular government practice presents serious problems, constitutional limits can be erected in relatively short order.

Court-created constitutional limits on privatization concerning political accountability have antecedents in recent Tenth Amendment jurisprudence² and not-so-recent nondelegation cases.³ In some nondelegation cases, it was important that policymaking was delegated to a private group.⁴ Political accountability has, in recent years, become very important in Supreme Court Tenth Amendment cases. Specifically, the Court has invalidated what it views as federal "commandeering" of state and local government agencies and officials on the normative ground that such commandeering obscures lines of political accountability.⁵

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1. *Infra* notes 39, 54 and accompanying text.

2. *Infra* Part I.B.1.

3. *Infra* notes 9, 14-18 and accompanying text.

4. *Id.*

5. *Infra* Part I.B.1.

There are so many varieties of "privatization" that privatization is difficult to define and analyze comprehensively. Most generally, privatization denotes the moving of something that had been in the public sphere into the private sphere. However, movement from public to private is not absolutely necessary, because something may be called privatized even if it always has been private, merely because it is publicly administered in another jurisdiction. Privatization analysis also captures entities such as government corporations that straddle the public/private divide and were created to address a particular policy problem in ways that are not clearly public or private. Further, although *marketization* and *deregulation* may be more accurate appellations, *privatization* may be used to describe an entity or activity that was always privately owned but has moved from a heavily regulated status to a less regulated one.⁶ The privatization label is accurate because decisions that were once made in a regulatory agency now are made privately in response to market forces.

Privatization thus denotes a broad spectrum of adjustments to the interaction between government and various private actors. One concern about privatization is that it can lead to less political accountability. In order to evaluate privatization through a political accountability lens, two questions need to be answered. First, has privatization actually reduced political accountability? Second, if political accountability has been reduced, is it a cause for concern in the particular context?

Viewed through the lens of political accountability, it quickly becomes clear that all privatizations are not created equal. Some forms of privatization may tend to reduce political accountability, some forms may be neutral, and some, surprisingly, actually may increase political accountability. The main purpose of this article is to look for these differences among different types of privatization. Part I introduces the concept of political accountability, with an eye toward speculation on whether a constitutional law of accountability in privatization might develop. Part II describes different categories of privatization and examines each type of privatization for its effects on political accountability, with some appropriate excursions into accountability-based or influenced constitutional doc-

6. The change in utility regulation is such an example. Most electric utilities and telephone companies in the United States were always private, but in recent years have moved to a more market-oriented system of operation. Jack M. Beermann, *The Reach of Administrative Law in the United States*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 171 (Michael Taggart ed., 1997).

trines. Part III briefly discusses the application of the Freedom of Information Act and related statutes and the Administrative Procedure Act to the activities of entities involved in privatization. The article concludes with a plea for a non-ideological attitude toward privatization, based on the variations among privatizations in political accountability and other terms.

I. ACCOUNTABILITY AND CONSTITUTIONAL CONCERNS

I am concerned here with the amenability of a government policy or activity to monitoring through the political process. There are several different ways in which a government policy or activity can be more or less subject to political monitoring. Political accountability should be understood to include the democratic character of decision-making, the clarity of responsibility for an action or policy within the political system, and the ability of the body politic to obtain accurate information about a governmental policy or action.

The democratic character of decision-making involves the degree to which the body politic can influence a decision, policy, or activity through political activity. The clarity of responsibility for an action or policy involves the degree to which the body politic can discern who in the political system is responsible for a decision, policy, or activity, so that efforts to exert political influence can be directed to the proper authorities. The ability of the body politic to obtain accurate information depends on the degree to which information on the activities is available. All these, and perhaps others not mentioned here, are distinct but related criteria for judging political accountability.

Assume for present purposes that at least some forms of privatization reduce the political accountability of a government activity or practice. For example, if Congress were to privatize fully the United States Postal Service,⁷ it is likely that it would be more difficult for the political system to influence the organization of the Postal Service, as well as postal rates and services. Although privatized, the Postal Service might remain highly regulated. If the Postal Service retained its monopoly over certain aspects of mail delivery, it is likely that Congress and the executive branch would subject the Postal Service to both formal and informal scrutiny, such as rate regulation and political pressure over other aspects of

7. By "privatize fully," I mean charter the Postal Service as a private corporation, offer shares to the public, and allow the private corporation to choose its officers and directors under corporate law without government involvement.

the Postal Service's organization. Nevertheless, it is likely that there would be less political influence over Postal Service decisions and activities because the decision-making process might be less democratic. It also might be unclear whether the private entity or the government regulators were responsible for any particular action. Similarly, it might be more difficult for the public to obtain information about the operations of the privatized entity.

At present, privatizations face few, if any, federal constitutional hurdles.⁸ For example, there is no doctrine of federal constitutional law that prevents municipalities from selling municipally owned electric utilities, mass transit systems, or professional sports facilities to private entities. Along the same lines, federal constitutional law has little, if anything, to say about a decision to contract with private entities for provision of public services, such as police and fire protection, operation of jails and prisons, street cleaning, garbage collection, inspectional services, and maintenance of public parks and buildings. There is no general federal anti-privatization doctrine requiring that particular government activities, state or federal, be conducted only by traditional government employees.

I do not mean to say that federal constitutional law has absolutely nothing to say about privatization. For example, if Congress were to decide to privatize the Postal Service and the privatized Postal Service were given the power to make governmental decisions without discernible statutory standards or governmental oversight, a delegation doctrine attack could be mounted.⁹ If the

8. See Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 MARQUETTE L. REV. 449, 455-56, 480 (1988) ("While privatization presents many legal issues, it does not confront serious legal constraints other than process requirements."). Dean Cass analyzes three constitutional constraints on or impediments to privatization, none of which have proven, thus far, to be serious impediments to privatization. These are: (1) applying the nondelegation doctrine, which limits Congress's ability to delegate legislative power to the executive branch and to private organizations, (2) holding government liable for the conduct of the private entity, and (3) holding the private entity liable (under public law norms) without affording the private entity immunities or privileges enjoyed by government. The second possible legal response discourages privatization, because it removes a potential incentive to privatize, i.e., that government is no longer responsible for the activity. The third possible legal response tends to make it more expensive to privatize an activity than to keep it inside government because it makes it easier to hold the private entity liable than it would be to hold government or government officials liable for the same conduct. *Id.* at 497-512; Clayton P. Gillette & Paul B. Stephan III, *Constitutional Limitations on Privatization*, 46 AM. J. COMP. L. 481, 481-82 (Supp. 1998) (discussing "paucity" of constitutional limitations on privatization).

9. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (noting that delegation problems were exacerbated because delegation was to private parties rather than gov-

resulting entity were quasi-public, or some sort of government corporation with partial government control, the method of appointing directors and other officers might be subject to scrutiny under the Appointments Clause.¹⁰

A. The Appointments Clause

The best candidate for a federal constitutional constraint on privatization of federal government activities may be the Appointments Clause. The Appointments Clause specifies the method for appointing “Officers of the United States.”¹¹ Principal officers must be appointed by the President “with the advice and consent of the Senate.”¹² Inferior officers may be appointed in the same way, but Congress may also legislate appointment by the President alone (without senatorial advice and consent) or appointment by a court of law or head of a department of the federal government.¹³

A person is an “Officer of the United States” for Appointments Clause purposes if that person “exercis[es] significant authority pursuant to the laws of the United States.”¹⁴ If Congress legislated the privatization of a federal agency—for example, if it decided to delegate the administration of federal environmental law to a privately-owned “Environmental Protection Agency, Inc.,”—the appointment of officials within the corporation would be subject to Appointments Clause attack, insofar as corporate officials exercised authority to enforce federal law, including rulemaking and other enforcement activities.¹⁵

A recent decision of the D.C. Circuit suggests that not all employees of the federal government must be appointed pursuant to the Appointments Clause.¹⁶ That court held that Administrative Law Judges who make recommendations to higher officials are

ernment officials); *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 501 (1935); A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 574-77 (discussing delegations to private entities).

10. Froomkin, *supra* note 9, at 574-77; *see also infra* Part II.E (discussing government corporations).

11. U.S. CONST. art. II, § 2, cl. 2.

12. *Id.*

13. *See id.*

14. *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (per curiam).

15. There are numerous government corporations that perform functions that might otherwise be performed by government agencies. Insofar as the appointment of officers and directors of these corporations departs from the Appointments Clause model, they may be subject to constitutional challenge. *See* Froomkin, *supra* note 9, at 574-77.

16. *See Landry v. FDIC*, 204 F.3d 1125, 1130-34 (D.C. Cir. 2000).

“employees” and not “officers” who must be appointed pursuant to the Appointments Clause.¹⁷ Apparently the D.C. Circuit believes that an official does not “exercise significant authority pursuant to the laws of the United States” unless that official has some power to make decisions with legal effect.¹⁸

In the case of a corporation formed to administer federal law, it would appear that the Appointments Clause presents a serious bar to allowing federal law to be administered by privately hired corporate directors, officers, or other employees. Even under the D.C. Circuit’s relaxed view of the applicability of the Appointments Clause, a corporate employee not appointed pursuant to the Appointments Clause could not take action that would have an actual effect on a member of the public.¹⁹ Rather, insofar as their actions were aimed at having some effect in enforcing federal law, corporate employees might be able only to make recommendations that would be carried out by properly appointed Officers of the United States. This would significantly reduce the utility of the privatization of the agency function.

The Appointments Clause is directly related to political accountability concerns. Even under the D.C. Circuit’s view, federal officials with power to enforce federal law must be appointed politically. Principal Officers must be acceptable both to the President and a majority of the Senate. Many inferior officers also will be appointed politically, by the President or a department head.²⁰

17. *Id.* at 1125.

18. *Id.* The status of the D.C. Circuit’s rule in *Landry* is somewhat doubtful because there is no Supreme Court authority to the effect that there are federal “employees” whose appointment is not subject to the Appointments Clause. Interestingly, the Supreme Court case that provides the D.C. Circuit some support is actually a privatization case in which the Supreme Court approved contracting out to persons providing support services for federal agencies without complying with the Appointments Clause. See *United States v. Germaine*, 99 U.S. 508, 512 (1878) (holding that a surgeon was not an “Officer of the United States,” because he was employed only on an as needed, fee for services, basis). Other Supreme Court cases cited by the D.C. Circuit provide only general definitions of “Officers of the United States.” *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976), *cited in Landry*, 204 F.3d at 1133. Another case relied on heavily by the D.C. Circuit in *Landry*, *United States v. Mouat*, 124 U.S. 303, 306-07 (1888), *cited in Landry*, 204 F.3d at 1133, actually provides support for the contrary view, that all federal employees are subject to the Appointments Clause. In *Mouat*, the Court held that a navy “paymaster” could not collect business travel expenses, because he was not appointed properly pursuant to the Appointments Clause. *United States v. Mouat*, 124 U.S. 303, 306-07 (1888).

19. See *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000).

20. Historically, the courts of law have not appointed many inferior executive officers. A notable exception is the independent counsel, under the now-expired Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified in scattered

Appointment through the political process is a device to keep officials exercising federal authority somewhat politically accountable.

Removal power may be even more important to political accountability than appointment power. After all, federal judges are appointed by the President with the advice and consent of the Senate, but they are shielded from political influence by their protection from removal except by impeachment. The Supreme Court has rejected attempts by Congress to assign executive functions to officials removable by Congress on the ground that executive officials should be accountable to the President, not to Congress.²¹ The possibility of removal of such officials by an executive branch officer accountable to the President might be sufficient to preserve the separation of powers,²² but any attempt to shield completely officers of the United States from removal initiated by political officials within the executive branch would probably violate accountability-preserving separation of powers principles.

B. Direct Constitutional Limits on Privatization

Thus, privatization of activities amounting to private execution of federal law might present serious constitutional problems arising from the appointment and removal of the directors, officers, and employees of the private entities that would enforce federal law in the privatized regime. What is missing, however, is a more direct analysis of the constitutionality of privatization. There may be certain functions that should not be privatized based on some principle that particular governmental functions must be performed only by government itself. Concerns about maintaining political accountability may counsel against privatization. For example, imagine a private regulatory agency—would we tolerate administrative rulemaking by a privately-owned “Environmental Protection Agency, Inc.,” charged with administering the environmental laws? Regardless of how accountable EPA, Inc., might be to Congress and whether notice and comment and judicial review applied in exactly the same way as they do to the actual Environmental Protection Agency (“EPA”), the lack of direct political accountability through the President might make such a reform unwise or unac-

sections of 2 U.S.C., 5 U.S.C., and 28 U.S.C.), provisions that were at issue in *Morrison v. Olson*, 487 U.S. 654 (1988).

21. See *Bowsher v. Synar*, 478 U.S. 714 (1986).

22. See *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that Congress may restrict removal of independent counsel to removal for cause by the attorney general, and that the President need not have removal power).

ceptable. Although the example may seem far fetched, it actually is not all that different from the provision of the Food and Drug Administration Modernization Act of 1997 that privatized some aspects of the medical device approval process and proposals to extend private review functions into the drug approval process.²³

The above analysis is applicable to federal privatization, and really would not touch state and local efforts to privatize. It is thus at least interesting, if not potentially fruitful, to speculate about the possibility of a more direct analysis of privatization generally. This is where the creative potential in constitutional law comes in. Although under current law there is no direct constitutional analysis of privatization, concerns about political accountability of privatized government provide for the possible evolution of a doctrine evaluating whether a privatized government function lacks sufficient accountability.

1. *Tenth Amendment Limits on Privatization*

It is useful to remember that current Tenth Amendment jurisprudence arose quite recently out of the ashes of the Court's failed attempt to construct a general Tenth Amendment standard for evaluating whether federal regulation of state and local government activity went too far. Under *National League of Cities v. Usery*,²⁴ the Court created and applied a three-factor test to scrutinize federal regulation of state government for compliance with Tenth Amendment limits on federal power. Under that test, as applied in later cases, "federal regulations are subject to Tenth Amendment attack only if they regulat[e] the States as States, address matters that are indisputably attributes of state sovereignty, and impair the States' ability to structure integral operations in areas of traditional functions."²⁵ The Court was divided over whether commandeering violated this test, with the majority holding that commandeering did not necessarily impermissibly displace state sovereignty.²⁶ Political accountability was not relevant to the

23. See Nick Littlefield & Nicole R. Hadas, *A Survey of Developments in Food and Drug Law from July 1998 to November 1999*, 55 FOOD & DRUG L.J. 35, 41 (2000) (describing use of private reviewers for low risk medical devices under Title II of the Food and Drug Administration Modernization Act of 1997, 21 U.S.C. § 301 (1994 & Supp. V 1999)).

24. 426 U.S. 833 (1976).

25. *FERC v. Mississippi*, 456 U.S. 742, 763-64 n.28 (1982) (internal quotations and citations omitted) (alteration in original).

26. *FERC v. Mississippi*, 456 U.S. 742, 761-62 & n.25 (characterizing Justice O'Connor's anticommandeering analysis as "demonstrably incorrect").

Court's Tenth Amendment jurisprudence under *National League of Cities*.

Post-*National League of Cities* Tenth Amendment jurisprudence has been built largely on a normative base concerned with issues of political accountability. The political accountability basis for Tenth Amendment limitations on Congress's power to regulate states goes back only to a dissent by Justice O'Connor in a 1982 case, *FERC v. Mississippi*, in which the Court upheld federal regulations that placed certain, largely procedural, obligations on state utility regulatory agencies.²⁷ In that dissent, Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, argued strongly against allowing the federal government to compel state agencies and officials to carry out federal regulation.²⁸ She argued forcefully that it should be unconstitutional for the federal government to regulate via a state agency.²⁹ One of her primary normative arguments against what has come to be called "commandeering" is that "Congressional compulsion of state agencies, unlike pre-emption, blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs."³⁰ In other words, the problem with federal law that requires states to regulate individuals in line with federal standards is that "lines of political accountability" become blurred, and it becomes uncertain who should be held politically responsible for the regulation.

After Justice O'Connor's dissent, two interesting developments occurred. First, the Court overruled *National League of Cities*, implying that the Tenth Amendment placed no legally enforceable restrictions on Congress' power to regulate states as states.³¹ Second, the Court has twice struck down federal legislation on a new Tenth Amendment theory, erecting what looks like a per se rule against federal commandeering of state agencies.³² Under this rule, although federal law may regulate states in their own activities, and may regulate private parties to the extent federal power over an area exists, it may not force state agencies and state offi-

27. *Id.* at 775-97 (O'Connor, J., concurring in part and dissenting in part).

28. *Id.*

29. *Id.*

30. *Id.* at 787 (citation omitted).

31. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

32. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Regulation of states' own activities is still allowed, although the line between commandeering and regulating a state's own activities is not particularly clear. See *Reno v. Condon*, 528 U.S. 141 (2000) (upholding statute that prohibited states from selling driver's license information pertaining to individual license holders despite argument that statute regulated the state's treatment of third parties).

cials to regulate private parties. The primary normative basis for this anti-commandeering rule has been the problems that commandeering causes with regard to political accountability.³³

2. *A Potential Accountability-Based Doctrine*

This has been a rather long story to make a rather narrow point: it is within current judicial practice on the Supreme Court of the United States that concerns over political accountability could give rise to a federal constitutional doctrine analyzing privatization for fidelity to structural constitutional principles.³⁴ Although some doctrines of constitutional law appear to spring from nowhere,³⁵ an accountability-based norm for evaluating privatization at least would appear to evolve from pre-existing Tenth Amendment accountability-based norms.

Without the benefit of even a suggestion by a member or members of the Court, it is difficult to imagine what an accountability-based limitation on privatization might look like. With regard to federal law, perhaps using the Court's definition of "Officer of the United States" as a starting point,³⁶ the Court could attempt to define "execution of federal law," and then create a rule barring such execution except by an agency of the federal government. Advocates of a rule disallowing private exercise of governmental power face the difficult task of satisfactorily distinguishing governmental from private power, for there are many situations in which private entities carry out the terms of federal law under which they are regulated or subsidized.

33. See *New York v. United States*, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.").

34. The politics of privatization make the emergence of such a doctrine unlikely now or in the near future for the simple reason that the conservative members of the Court are likely to favor privatization. President George W. Bush is likely to appoint Justices who share this view. The Justice's legal doctrines are designed to effectuate their normative political views, and law has very little to do with Supreme Court decisionmaking, at least in cases implicating strongly held political views.

35. For example, I daresay that before *Bush v. Gore*, 531 U.S. 98 (2000), very few observers of federal constitutional law would have found in that law a norm subjecting variations in ballot counting procedures to strict scrutiny and holding that differing standards for counting ballots would be held to violate equal protection without regard to whether they were the product of intentional discrimination and without regard to the government interest underlying the differing standards. I believe a similar story could be told about *Roe v. Wade*, 410 U.S. 113 (1973), or at least its primary antecedent, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

36. See *supra* notes 14-18 and accompanying text (discussing *Buckley v. Valeo*, 424 U.S. 1 (1975), and limits on exercise of government power by private persons and entities).

Accountability considerations might be of some help in distinguishing permissible from impermissible privatization. An accountable agency might satisfy concerns over privatization in the following manner. Consider, for example, partial privatization of environmental enforcement. Congress could adopt legislation allowing a private entity to monitor pollution and certify to the EPA that all regulatory requirements have been met. The legislation could allow the EPA to establish standards and actually choose the private entities qualified to perform the monitoring and make the necessary certifications. If the EPA provided clear instructions to the private enforcers, and remained fully accountable for successes and failures of the privatized regulatory scheme, and if complete information were available regarding the activities of the private company, accountability might not prove an impediment to privatization.

Since federal authority is exercised by entities of many different forms, a direct analysis of federal privatization also would require a definition of "agency of the federal government." In addition to traditional departments and agencies within departments, there are agencies outside of departments, independent agencies, wholly owned government corporations, corporations partly-owned by the federal government, and privately owned but federally chartered corporations. Even if a rule confining the exercise of certain powers to the government were created, a formal, pragmatic, or functional test would be necessary to determine whether a particular entity was governmental and could exercise government power.

It is much less likely that federal constitutional limits on state privatization would be recognized, because state law would govern questions regarding the proper organization of state government and federal separation of powers norms would be irrelevant. The substance of the Guarantee Clause³⁷ might include limits on state privatization, but that clause has not been judicially enforced with any vigor.³⁸ If a state privatized government activities to shield them from scrutiny by the public, would that violate the Guarantee Clause, or some other federal principle, like one-person one-vote? State constitutions themselves contain limits such as accountability

37. U.S. CONST. art. IV, § 4.

38. *See* *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (holding that Guarantee Clause issues surrounding which of two competing state governments was legitimate were nonjusticiable).

provisions and separation of powers norms, and these might provide some limits on privatization of state government activities.³⁹

The likelihood that accountability concerns would motivate courts, particularly the Supreme Court of the United States, to limit privatization depends, at least in part, on how serious of a perception there is that privatization reduces political accountability where political accountability is desirable. Although I do not predict that such a doctrine will arise, and I do not attempt to outline the specifics of such an accountability-based anti-privatization constitutional doctrine, it is worthwhile to consider whether privatization has the potential for causing accountability problems as serious or more serious than those that the Court states motivate its Tenth Amendment jurisprudence. The current Court does not appear to be ideologically disposed against privatization. Quite the contrary appears to be true, and thus the proponents of anti-privatization constitutional law have an uphill battle if they attempt to convince what appears to be a conservative Court that privatization is an evil the Court should resist.⁴⁰

39. See Julie H. Vallarelli, *Note, State Constitutional Restraints on the Privatization of Education*, 72 B.U. L. REV. 381, 393 (1992) (discussing limitations on privatization that may inhere in state "accountability" clauses). Vallarelli cites the Massachusetts constitution which provides: "All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them." MASS. CONST. pt. 1, art. V. The federal Accountability Clause does not appear to address privatization; it is a prohibition on spending federal money without congressional authorization, and it requires that expenditures be accounted for: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." U.S. CONST. art I, § 9, cl. 7. For some state constitutional challenges to privatization, see *Hicks v. Commonwealth*, 535 S.E.2d 678 (Va. Ct. App. 2000) (upholding a decision to privatize streets around housing project and enforce trespass laws on private streets against constitutional challenge); *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000) (finding the privatization of a water project an unconstitutional delegation of legislative power to private entity); *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997) (declaring a statute allowing a private entity to receive public funds to eradicate pests an unconstitutional delegation of legislative authority to private entity). Some state constitutions also have "civil service clauses" which can limit privatization, insofar as non-civil service employees perform government functions. See CAL. CONST. art. VII, § 1; *State Comp. Ins. Fund v. Riley*, 69 P.2d 985 (Cal. 1937) (state civil service clause implicitly prohibits contracting out for services traditionally performed by the state); see also *Prof'l Eng'rs v. Dep't of Transp.*, 936 P.2d 473 (Cal. 1997).

40. The best hope for a declaration of unconstitutionality with regard to a structural matter normally exists when the Court is convinced that a particular constitutional procedure, such as the Appointments Clause, has been violated. See *Buckley v. Valeo*, 424 U.S. 1 (1975); *INS v. Chadha*, 462 U.S. 919 (1983).

Privatization could cause problems of political accountability similar to those caused when the federal government commandeers state officials to carry out federal policy. As elaborated below, if a private entity were entrusted with carrying out a government activity, it might be difficult for the public to know whom in the political system to blame when things go wrong. The accountability effects would vary greatly among the contexts in which privatization has occurred. Thus, the next section of this article looks at a wide array of privatizations and explores the accountability issues that inhere in each.

II. PRIVATIZATIONS

In his comprehensive review of the policy issues underlying the privatization movement,⁴¹ Ronald Cass divided privatizations into four categories: (1) divestiture, which means the sale of government assets including state-owned enterprises; (2) contracting out, which means contracting with private parties for performance of both internal and external functions such as cleaning and maintaining government buildings and providing government services to members of the public; (3) deregulation and vouchers, which mean reducing or eliminating regulation of private entities so that decisions are made privately rather than politically or giving benefits recipients the choice to go into the market for goods and services rather than being confined to those provided directly by government; and (4) tax reduction and employing user fees, which is privatization in that it either returns money to private entities or at least targets payments to government so that private parties do not have to pay for government services they do not want. With some refinement, these are useful categories for analyzing privatization in accountability terms. In addition to these categories, I consider special issues that arise regarding government corporations and similar public/private partnerships, and I also focus attention on the application of procedural structures such as the Administrative Procedure Act ("APA")⁴² and the Freedom of Information Act ("FOIA")⁴³ to private entities involved in privatization.

41. Cass, *supra* note 8, at 449.

42. 5 U.S.C. §§ 551-559 (1994).

43. *Id.* § 552.

A. Divestiture

Divestiture includes two distinct activities, selling government assets such as land, buildings, or equipment that the government decides are no longer useful assets, and selling government owned enterprises, such as state owned transportation, housing, or utilities, where the intent is for the private owner to continue to operate the enterprise in government's stead. As long as asset sales are conducted pursuant to normal government procedures, accountability is less of an issue in asset sales than in the sale of enterprises. Of course, once an asset becomes private, its use is likely to be subject to less government supervision than when it was under public ownership, so an accountability issue does exist. For example, if the government sells a tract of undeveloped land, government regulation of that land's use is likely to be less than if government retained ownership. There may be controversy over government's decision to divest itself of an asset, but the sale of a raw asset does not significantly affect political accountability over an activity that has moved from the public into the private sector.

Sale of an ongoing government enterprise presents a greater possibility that reduced political accountability will be a significant result of the sale. For example, when the federal government sold Conrail, the railroad became less subject to political control than when it was owned by the federal government.⁴⁴ If a local government sells its bus service or its electric utility to a private company (or converts the existing entity to a private corporation by publicly offering shares), political control is likely to be less than under continued government ownership and operation.⁴⁵

The difference in political accountability has to do with the degree to which ongoing discretionary operational decision-making is made under direct government control. For example, in a publicly owned bus service, political accountability for the level of service

44. CONSOL. RAIL CORP., A BRIEF HISTORY OF CONRAIL (1999) (describing the history of Conrail, including its formation by the federal government and ultimate privatization), <http://www.conrail.com/history.htm>.

45. Municipally owned utilities are common in the United States. My guess is that most water and sewer services, where they exist, are provided through municipal or state sewer and water agencies. Municipal power companies are also still quite common, with recent newspaper articles identifying, for example, forty municipal electric companies in Massachusetts that serve customers in fifty-eight municipalities and provide "about 13 percent of the state's power needs," at prices substantially lower than those charged by privately owned utilities even under deregulation. Bruce Mohl, *Power Rates Up, But Officials Insist Deregulation Working*, BOSTON GLOBE, Jan. 26, 2001 at C1, 10; Peter J. Howe, *It Pays to Be Local: Municipal Electric Customers Dodging Rate Increases of Big Utilities*, BOSTON GLOBE, Jan. 26, 2001 at C1, 10.

provided and the prices charged is direct. Voters can reward or punish legislators and elected executive officials for the performance of the service. A privatized system might be subject to a wide range of regulation, but privatization is almost certain to lessen the degree to which those running the bus company are subject to political accountability for their decisions. The regulators, of course, remain politically accountable and politicians might be blamed (or praised) for the privatization decision itself.

The ability of the body politic to influence the operation of the privatized enterprise is likely to be reduced after the sale. However, strict government regulation can maintain a high degree of political accountability. This has been especially true in developed countries in which many utilities and large enterprises were state-owned and only recently have been privatized.⁴⁶ These countries may have more recently begun to marketize the operation of these enterprises, which would further reduce political accountability, but private ownership does not necessarily eliminate significant political accountability for the operation of privatized enterprises.⁴⁷

The ability of the public to identify who is responsible for problems in the operation of the privatized entity also may be lowered after privatization, although that is not necessarily the case. The issue of public employee labor unions is discussed *infra*.⁴⁸ With regard to a private, but highly regulated, enterprise, government and the private owners may blame each other when post-privatization problems arise. Further, as often has been the case with regulated industries, what the public understands as regulation may be experienced and understood by the regulators and regulated as subsidization.⁴⁹

Privatized enterprises also might be able to avoid procedural and openness restrictions that apply to government-owned enterprises. Regulation might require the enterprise to submit financial information for government review, but in most situations FOIA principles and procedural protections such as those contained in the

46. See generally Mark Aronson, *A Public Lawyer's Responses to Privatisation and Outsourcing*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 40 (Michael Taggart ed., 1997).

47. *Id.*

48. See *infra* notes 53, 111 and accompanying text.

49. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 140 (1982) (describing how pressure for regulation "invariably" comes from regulated parties, not the public); see also Jonathan Macey, *Promoting Public Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

APA are unlikely to apply to privatized enterprises.⁵⁰ The market may provide an adequate substitute if the privatized entity is forced to compete in an open market, but political accountability per se is likely to be reduced.

B. Contracting Out

The second form of privatization Cass analyzes is called "contracting out." Here, too, the general category includes different types of privatization that raise radically different accountability issues. Contracting out describes an incredibly wide range of possible privatization. On the most mundane level, government procurement of office supplies and other necessary goods and services unrelated to discretionary government decision-making or coercive government action can be seen as a form of privatization, especially if government decides to purchase something on the market that it, at one time, produced itself. I call the goods and services involved here "support goods and services" because they support government's ability to perform its functions but do not involve dealings with the public in the governing sense.

No business produces all the goods it uses, and the same reasons that lead firms to contract out should lead government to contract out.⁵¹ Government may, for example, shut down a heating plant used to heat government buildings and purchase heat from private sources. The United States Government Printing Office produces and sells government publications, and it is easy to imagine privatization of some, most, or all of the printing and sales.

In my view, contracting out of support goods and services does not raise serious accountability issues since the source and quality of such goods and services are not normally something the public cares much about. Of course, corruption in the procurement process may be an issue, and obviously procurement fraud does not exist without procurement, but government officials remain accountable for overspending on goods and services, and the savings from competition to sell to the government is likely to dwarf any increased potential for fraud that procurement entails.

Procurement of support goods and services does raise one central area of controversy in privatization—labor issues. Privatiza-

50. See *infra* Part III.

51. See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (describing how increasing monitoring costs as firms grow larger lead firms to contract out, thereby gaining market discipline in the place of hierarchical discipline within the firm).

tion of support goods and services often is advocated as a money saving proposition, and from the perspective of government workers, the money is saved at their expense. Often, the most vocal opponents of privatization proposals of many types including support goods and services are the government workers who either would lose their jobs, face transfer to different units, or who may end up working for the private company hired to provide the good or service.⁵²

Although government workers may lack legal standing to challenge privatization,⁵³ they are often a potent political force in opposing privatization.⁵⁴ There is at least a perception that some of the gains from privatization come from the ability of private business to operate free from the necessity of dealing with government workers who have strong civil service protections regarding job security and work rules.

Government workers can make some traditional labor arguments against privatization. Government workers have very strong protection of job security in the form of civil service statutes and rules.⁵⁵ Further, government workers enjoy constitutional protections that are not shared by workers in the private sector, both in terms of due process protections of job security and anti-discrimination norms that apply only to state action. Government workers also may be protected by statutory anti-discrimination norms and by executive orders that do not apply in the private sector.⁵⁶ There

52. See, e.g., Judith Havemann, *Welfare Reform Incorporated: Social Policy Going Private; States Turning Agencies Over to Business*, WASH. POST, Mar. 7, 1997, at A1; Editorial, *Charter Amendment is Ill Advised*, OMAHA WORLD-HERALD, Nov. 3, 2000, at 22 ("Moreover, this amendment would be a regrettable precedent. It is a brainchild of organized labor, which hates the privatization of public jobs."); Brian C. Mooney, *DeNucci May Bar \$305m Bus Deal*, BOSTON GLOBE, May 16, 1997, at B3 ("Privatization, a watchword of Governor William F. Weld's administration and a political battle cry for organized labor, faces a crucial test today.").

53. See *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 530 (1991) (postal workers union lacks standing to challenge Postal Service's decision to give up its monopoly over international remailing services).

54. As noted *supra* note 39, civil service protection for government workers is mandated in some state constitutions. This mandate can become a protection against privatization, prohibiting private, non-civil service employees from performing work traditionally performed by government employees. See CAL. CONST. art. VII, § 1; *State Comp. Ins. Fund v. Riley*, 69 P.2d 985 (Cal. 1937); *Prof'l Eng'rs v. Dep't of Transp.*, 936 P.2d 473 (Cal. 1997).

55. See generally *Developments in the Law: Public Employment*, 97 HARV. L. REV. 1611, 1619-76 (1984) (describing civil service system).

56. Exec. Order No. 13,087, 3 C.F.R. 191 (1998) (prohibiting discrimination in the federal government on the basis of sexual orientation); Exec. Order No. 13,152, 3 C.F.R. 264 (2000) (prohibiting discrimination in the federal government on the basis

also may be a feeling that, in addition to special rules like civil service protections, the legal rights of workers in many areas such as anti-discrimination and wage and hour protections are respected and enforced more in the public sector than in the private sector.

From one perspective, privatization that shakes an agency loose from labor related restriction can increase accountability, in sort of a perverse way. There are some circumstances in which government bureaucrats can place the blame for their failure to fulfill their missions or operate efficiently on labor restrictions, arguing that government workers have such great job security that it is impossible to get them to work hard, or that work rules are enforced so strictly in the government setting that it is impossible to accomplish anything innovative.⁵⁷ Whether these or similar stories are true is beside the point. They are certainly believable, and they allow agencies to dodge accountability for their failings.

An agency that has privatized a function can no longer shift blame to government workers and strictly enforced work rules. Accountability is thus enhanced. When the private entity chosen to perform the function fails to perform adequately, blame can be placed squarely with the agency that chose the private company or the agency that is supposed to monitor the performance of the private entity. One major qualification is that an agency can attempt to avoid blame by pointing to procurement rules that forced it to choose an inferior supplier because that supplier had the best bid within the restrictive rules.

Another form of contracting out straddles the territory between contracting out for support goods and services and privatizations that affect the public. For example, road building and maintenance are public-oriented government activities but normally do not involve any policymaking or discretionary decision-making that would raise serious accountability concerns. I expect that the federal, state, or local transportation department hiring the private firm would remain fully accountable for the performance of the private firm, although the same labor issues raised above arise here. Further, as in procurement, the cost of bringing all road

of parental status). This situation has been equalized somewhat by executive orders that apply to government contractors. Exec. Order No. 10,925, 3 C.F.R. 448 (1961) (discussing how government contractors also have been held to higher standards than others with regard to employment discrimination and affirmative action).

57. See *Developments in the Law: Public Employment*, *supra* note 55, at 1631 (describing civil service system as "a barrier to the dismissal of incompetent employees and an impediment to government efficiency").

building and maintenance in house would be too great to justify small gains in government accountability.

Contracting out also can involve activities that raise serious issues of government accountability, in which the government pays a private entity to perform an activity that might normally be performed by the government involving discretion and government power over individuals and other private entities. This category includes private operation of institutions that perform governmental functions, like privately operated prisons and even privately operated public schools;⁵⁸ private provision of government services such as educational services for special needs or emotionally disturbed students; and private administration of welfare, social welfare, and social insurance programs. There are two sides to this group; one I call provision of services and the other I call benefits decision-making, both of which have been privatized in some jurisdictions. In the provision of services category, government can contract out the operation of public schools, treatment and educational facilities for mentally ill children, social services for neglected and abused children, and a host of other institutions that could be operated by government. On the benefits decision-making side, the function of making benefits determinations and paying benefits under welfare and social insurance programs has been privatized, with private companies, subject to government supervision, determining coverage and making payments to individuals and health care providers, for example.

Both of these types of contracting out can raise serious accountability issues. If a local school board decides to hire a private company to operate the public schools under contract, questions arise concerning the ability of the school board, and through the board, the public, to control the operation of the schools. The school board normally maintains control over the schools through budgetary approval and the hiring and firing of important personnel, including the superintendent and principals. The school board also

58. For example, my employer, Boston University, operates the school system of Chelsea, Massachusetts, under a contract with the local school committee. There are also private companies that step in to operate poorly performing schools under contract. See Edward Wyatt, *Privatizing of Five Schools Faces a Fight*, N.Y. TIMES, Jan. 30, 2001, at B3 (discussing the New York City Board of Education's plan to turn management of city's lowest performing schools over to Edison Schools, Inc., a private company in the business of operating public schools); Nora Coronado, *Kearney, Liberty school districts contract out summer programs*, KAN. CITY STAR, Mar. 21, 2001, at 5 (reporting on Kansas school districts' contracts with Edison Schools, Inc., to run summer school programs).

may maintain control by requiring that some matters that might appear to be day-to-day issues come before the board for approval. Accountability can be reduced even if the school board maintains ultimate control over the schools through the choice of the contracting party, unless mechanisms are established to maintain control over and scrutiny of the details of school operation.

In the private prisons context, the issues are somewhat different. The public is not as interested in the day-to-day operation of prisons as it is in the day-to-day operation of public schools. The public is concerned that prisons are secure. Although some private groups monitor the treatment of inmates and raise concerns when inmates are mistreated, in my view the general public shows little concern for the marginal welfare of inmates as long as they are not treated brutally while in prison.⁵⁹ Privatization of prisons and other government functions has raised concerns that the profit motive of private corporations running prisons and other institutions will lead to lower quality services, which in the prison context means less secure facilities and ill treatment of inmates.⁶⁰ The profit motive, it is feared, could lead private prisons to hire fewer guards, risking escape and inmate violence, as well as to the curtailment of programs such as recreation and education that are more costly than simply warehousing inmates.⁶¹ It is also feared that private prisons may try to save money by providing less favorable physical conditions and inferior food.⁶² Further, it is feared that private prison guards will not be as well-trained and disciplined, and this might lead them to use more force against inmates, making brutality a more serious problem in private prisons.⁶³

These issues surrounding private prisons are more substantive than accountability based. Presumably, a government agency will be responsible for monitoring the performance of private prisons. If escapes occur, or if a scandal over the mistreatment of inmates erupts, the officials of that agency and those in government who

59. This is a wholly unsupported intuition. An interesting argument against private prisons is that the profit motives leads private prison operators to lobby for longer sentences so that the need for prisons will increase. See, e.g., Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2159 n.101 (1996), Chase Riveland, *Prison Management Trends, 1975-2025*, 26 CRIME & JUST. 163, 194 (1999), Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 671 (1987).

60. See Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 815 (1987).

61. See *id.* at 815-16.

62. See *id.*

63. *Id.* at 816.

supervise them will suffer the political consequences. Although general issues regarding treatment of inmates have not, in most circumstances, been a significant political issue, if a controversy were to erupt, it may be more difficult for the body politic, perhaps through legislative hearings and action, to monitor and influence the performance of private prisons than publicly operated ones.

Some substantive concerns over private prisons have been raised and partially answered by legal decisions. The primary question is whether inmates will lose the ability to enforce government's constitutional obligation to provide adequate conditions of confinement and not use excessive force against inmates. Although it is not completely settled, it appears that private prisons are subject to the same constitutional constraints and obligations that apply to government-run prisons,⁶⁴ and the ability to enforce those constraints and obligations may actually be enhanced under privatization because private prison guards are not protected by the official immunity defense available to government employees.⁶⁵

In the benefits administration context, serious potential problems with the quality of services delivered are blamed on the profit motive. However, because the private entity is merely administering a benefits program designed through legislative and agency action, democratic accountability issues are not significant in such cases. A private company might be able to escape accountability for rule-like determinations, for example, if it creates rules of thumb to apply to a class of cases. Such rules might be subject to notice and comment or publication requirements if they were made by a government agency.⁶⁶ The short answer to this accountability problem is that private entities, in the contracting out situa-

64. The Supreme Court has not decided definitively whether private prison guards and other private prison officials are state actors for the purposes of constitutional duties and enforcement. However, it appears that they are. The Court has ruled that a private doctor under contract to provide specialized medical care to inmates acted under color of law when he allegedly exhibited deliberate indifference to an inmate's serious medical needs in violation of the Eighth Amendment. *West v. Atkins*, 487 U.S. 42, 57 (1988). In *Atkins* the Court reasoned that "[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights." *Id.* at 56. The same reasoning applies to contracting out of custody itself.

65. See *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

66. The federal APA exempts rules on benefits from its notice and comment requirements, 5 U.S.C. § 553(a)(2) (1994), but federal agencies are required to publish their rules in the federal register. *Id.* § 552(a)(1)(D). Failure to publish a rule precludes it from being applied against a private party not having actual notice of the rule. *Id.* § 552(a); *Morton v. Ruiz*, 415 U.S. 199, 232-33 (1974).

tion, should not be making rules, but rather should be administering rules made by the agency for which they act. The private company may be more difficult to monitor and influence, but the agency in charge of the program at issue should provide sufficient political accountability for the program's administration. Further, unlike government employees who may enjoy strong job security, private contractors operate with the knowledge that they always can be replaced, making them anxious to satisfy the agency that employs them.

Due process is a serious concern in the privatization of government institutions that affect private individuals. In some government institutions, due process is a major issue. Prisons, schools, and benefits administering agencies are all frequently required to provide due process to people who wish to contest a decision such as solitary confinement for a prison rule violation, suspension for misbehavior in school, or lack of eligibility for a government benefit.⁶⁷ Privatization raises the question whether due process norms that apply in government decision-making will apply to private institutions in contracting out situations. This is accountability writ small since it is concerned with correctness and fairness in individual decisions, not with accountability to the body politic generally. Arguably, due process norms should govern when privatization substitutes a private company for a government agency in benefits and similar matters. If a private entity is acting on behalf of a government agency, the same reasons for applying the government's Eighth Amendment obligations regarding treatment of prisoners should lead to the application of due process norms to private entities in contracting out situations. Nothing in the relationship between the agency supervising the private prison and the company running the prison appears to provide a substitute incentive to treat inmates fairly in procedural matters.

C. Deregulation, Cooperative Government, and Vouchers

Deregulation, cooperative government, and vouchers compose the next category of privatization. It, too, encompasses a wide range of government action, including deregulating personal matters such as marriage and similar relationships, deregulating industries such as utilities and transportation providers, cooperative and marketized regulatory schemes, negotiated rulemaking, and shift-

67. Because the focus here is on entities that affect the public, I set aside claims by workers to due process when a government employer takes adverse employment action.

ing from government provided goods and services to privately provided goods and services with government support to the purchaser. The accountability implications of deregulation vary almost as widely as the forms of enterprises subject to possible deregulation. Cooperative government presents a problem of agency capture and may make monitoring by the public more difficult. Voucher systems are related to deregulation because they are targeted at potentially reducing the government role in a particular area, such as education or housing, or at least applying the discipline of competition to government in the same way that deregulation applies competition to regulated and protected industries.

1. *Deregulation*

a. *Deregulation of Personal Relations*

The accountability issues differ depending on the kind of deregulation under consideration. I first consider deregulation of personal relations like marriage. Imagine deregulation of marriage, with reduced government regulation of who is eligible to marry, who can perform the ceremony, and what the legal incidents of the relationship are.⁶⁸ Note that in the United States marriage is somewhat deregulated compared to some other countries. In the United States, private clergy and other private persons with government permission can perform legally binding marriages while in some countries a civil service performed by a government official is required.⁶⁹ However, even with privatized performance of marriage ceremonies, there are still strict limits on who can marry, and there is still a great deal of regulation of the consequences of ending marriages, especially when children are involved.⁷⁰

68. There is a great deal of scholarly debate over whether government should increase, decrease, or maintain the current level of regulation of the marital relationship. See generally Katharine B. Silbaugh, *Accounting for Family Change*, GEO. L.J. (forthcoming 2001) (reviewing JUNE CARBONE, *FROM PARTNERS TO PARENTS, THE SECOND REVOLUTION IN FAMILY LAW* (2000)); Katharine B. Silbaugh, *One Plus One Makes Two*, 4 GREEN BAG 2D 109 (2000) (reviewing MILTON C. REGAN JR., *ALONE TOGETHER: LAW AND THE MEANING OF MARRIAGE* (1999)). Regan argues for relatively strong regulation of marriage so that the law will express the positive values of marriage. *Id.* at 109-10. Silbaugh argues that Regan's proposals would exacerbate gender problems of marriage as currently practiced. *Id.* at 117-18.

69. For example, in Germany, a civil service is required and it must precede any religious ceremony. See INTRODUCTION TO GERMAN LAW 254 (Werner F. Ebke & Matthew W. Finkin eds., 1996).

70. There have been constitutional challenges to some aspects of divorce regulation. For example, there have been equal protection challenges to statutes that allow courts to order divorced parents to pay for their childrens' postsecondary (college) education when married parents are not so required. These challenges have been re-

What might deregulated marriage mean? Bigamy might be legal, and there are likely to be communities in which it would be practiced, based on religious or cultural beliefs. Same-sex couples also might enter into marriages. The incidents of marriage also might become subject to free choice, whether by contract or by some new form of agreement called *marriage agreements*.⁷¹ For couples marrying within particular religious or cultural traditions, form agreements might be developed within such communities to provide the incidents of marriage.

From a privacy perspective, the whole idea of privatized marriage would be to eliminate political accountability over the personal relationships involved, just as the Supreme Court has relied on privacy notions to hold unconstitutional government regulation of certain personal activities such as use of birth control⁷² and abortion.⁷³ Deregulation of marriage is desirable from this perspective because people's decisions about intimate, private matters should not be subject to control by the body politic.

Marriage has been deregulated somewhat in recent years in at least a couple of important respects. First, courts are much more willing to enforce antenuptial agreements.⁷⁴ This allows the parties, rather than the law, to specify some of the consequences of divorce, most notably financial matters such as property division and alimony. Second, the law has shifted from fault-based divorce to no-fault divorce,⁷⁵ which allows the parties, rather than the courts, to decide when divorce is appropriate. These are significant

jected on the ground that the classification is reasonable in light of disadvantages likely to be suffered by children of divorced parents. *E.g.*, *Childers v. Childers*, 575 P.2d 201 (Wash. 1978); *The Marriage of Kohring and Snodgrass*, 999 S.W.2d 228 (Mo. 1999); *see also* *L.W.K. v. E.R.C.*, 735 N.E.2d 359, 371 (Mass. 2000) (holding that (1) even if noncustodial father disinherits minor child in will, court-ordered support obligation survives his death; that (2) assets of the estate, including assets in an inter vivos trust, may be reached to satisfy support obligation; and that (3) court may not posthumously expand support obligation to include post-secondary educational expenses).

71. *See* Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 *DENV. U. L. REV.* 1235, 1249-50 (1996) (discussing possibility that allowing private agreements could result in legal recognition of same-sex relationships). Some regulation based on capacity to enter into the relationship such as age or mental illness might be retained although others, based on factors such as gender or status as blood relation, might not.

72. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

73. *See* *Roe v. Wade*, 410 U.S. 113 (1973).

74. *See* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 *Nw. U.L. REV.* 65, 76 (1998).

75. Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 *OR. L. REV.* 649, 666-67 (1984).

deregulatory moves that privatize an important part of decision-making in the area of marriage.

More complete deregulation of marriage would raise a host of substantive issues and questions about what legal regime would govern absent what are now understood as the legal incidents of marriage. Would contracts designed to take the place of marriage be legally enforceable? Would courts scrutinize such agreements for fairness, morality, and other public policy questions, including, perhaps, whose agreements will be unenforceable due to violation of public policies against such practices as multiple marriages and same-sex marriages? How would courts protect vulnerable third parties such as children born within privately agreed-upon relationships? Would courts, in the course of deciding on the enforcement of private agreements, create a set of common law doctrines to take the place of law now understood as part of the regulation of marriage? How would the tax system treat the income and assets of the privately ordered relationships that would fill the gap left by the absence of state-sanctioned marriages?⁷⁶ Courts might slowly but surely reinstitute marriage-like norms when they are called upon to enforce privatized agreements.

Although deregulating marriage arguably would be liberating for those who are disfavored under current law, the worry also has been expressed that privatization of these relationships could exacerbate power inequities that the law ameliorates through its regulation of the marriage relationship.⁷⁷ The body politic might not stand for giving up accountability for this type of conduct. Unless government were somehow disabled from acting, the body politic's reluctance to cede control of family relationships would likely translate into regulation because the politicians with the power to regulate would be held accountable for not regulating.

b. Deregulation of Markets

More commonly thought of under the deregulation rubric are government decisions to allow more competition in an area of the economy in which government regulation had previously limited competition. Deregulation of previously regulated businesses can

76. Cf. Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996); Nancy C. Staudt, *Taxation and Gendered Citizenship*, 6 S. CAL. REV. L. & WOMEN'S STUD. 533 (1997).

77. See Mary Becker, *Sexuality: Problems with the Privatization of Heterosexuality*, 73 DENV. U. L. REV. 1169, 1170 (1996) (allowing private bargaining in heterosexual and same-sex relationships may ultimately result in "waiver of rights by the economically weaker party").

reduce accountability, although the common fact that some substantial regulatory structure remains after deregulation tends to preserve a measure of accountability.

In the United States, deregulation is probably the most common form of privatization over the past couple of decades because the public sector was much smaller in the United States than in other developed countries.⁷⁸ In many countries, it was very common for most or all utilities to be publicly owned.⁷⁹ In those countries, two stages of privatization were necessary: divestiture and then deregulation. In the United States, while there has been substantial public ownership of utilities, most energy and communications utilities have long been privately owned within a strict regulatory system.⁸⁰ Thus, the divestiture step was not necessary.

One prominent example of deregulation, long distance telephone service, appears to have been very successful. Rates have decreased and services available have expanded.⁸¹ Ratemaking in this area is much less open to input in the public than it had been in the past, since rates take effect in accordance with tariffs filed by carriers without significant scrutiny from regulators.⁸² However, the tariff filing system allows for at least a small measure of accountability, which the Supreme Court apparently thought important since it ruled that the Federal Communications Commission ("FCC") lacked power under federal law to exempt nondominant carriers (everyone but AT&T) from the tariff requirement.⁸³

When competition is introduced into a previously regulated market, consumer preferences (private) rather than regulatory standards (public) dominate price setting and the scope of goods or services provided. This would appear to be a direct reduction of political accountability, albeit in a trade-off for greater accountability to the people as private citizens or market participants. Even if private accountability increases more than the decrease in political accountability (if such a comparison were possible) there may be normative reasons for preferring political accountability. For ex-

78. Beermann, *supra* note 6, at 171.

79. *Id.*

80. *See* Beermann, *supra* note 6, at 171.

81. Kelly Hearn, *Hold the Phone!*, CHRISTIAN SCI. MONITOR May 8, 2000, at 11 ("Fierce competition, deregulation, and technological advances are reconfiguring the telecommunications industry, driving down long-distance phone rates and giving consumers a seemingly limitless—if sometimes baffling—array of service options . . .").

82. *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994) (discussing the FCC's tariff scheme).

83. *Id.*

ample, deregulation of an important service such as local telephone service may, overall, increase the average person's degree of control over prices and services. However, it may decrease the ability of a poor person or a person living in a remote area to afford service. Political actors, in a situation of regulation, may require that service be provided to those who could not afford it in the market.

Of course, to those favoring deregulation, the tendency of the political system to distort market outcomes is the evil to be avoided. Accountability through the political system means that political power rather than the market determines important issues of price and distribution. At a minimum, public choice analysis has demonstrated that political power is not necessarily distributed justly, and that the outcomes generated by the political process are not necessarily good or just by any measure.⁸⁴ This does not really answer the question as to whether the distribution that results from a free market is fairer or more just, since the economic power to have market influence also may not be justly distributed. The public choice critique of the political process should not be taken too far because it quickly can become a general attack on nearly all government action. Nevertheless, it is a relevant consideration in this particular context that should not be ignored.

In fact, regulation of prices and services can raise an interesting accountability problem of its own that is related to the discussion *infra* of decreased taxes and user fees. When, for example, a utilities commission regulates rates in a way that results in cross-subsidization of one market segment by another, or when government action results in prices that vary from what a market would produce, accountability is less clear than if there were a tax imposed on one group that was explicitly used to subsidize another group. In effect, the government can use redistributive regulation to impose a tax without including the tax in the government's budget, and without the tax appearing clearly on any tax bill or return. Imagine a bill for local phone service that said: "Market Rate, \$10.00; Government Imposed Rate to Subsidize Rural Customers, \$25.00." Or imagine a price sticker on milk products that stated: "Market Price, \$1.50; Price Under Government Price Supports to Subsidize Dairy Farmers, \$3.00."⁸⁵ In fact, the FCC is aware of potential

84. See Macey, *supra* note 49, at 231-32 (describing how "laws that are enacted will tend to benefit whichever small, cohesive special interest groups lobby most effectively").

85. I mean to distinguish purely redistributive regulation from other regulation such as health and safety regulation. Although health and safety regulation also may

public resentment over government imposed costs and it has, in at least one instance, prohibited communications service providers from explicitly identifying fees as FCC imposed.⁸⁶ It would enhance political accountability if it were easier to know when prices are artificially high because the government has decided to increase a producer's income at consumers' expense or has decided that one group of consumers should subsidize the consumption of others.

In general, those in favor of deregulation have a strong accountability-based claim on their side, that in many circumstances the market is less distorted than the political system. Overall accountability, in terms of responsiveness to popular will, is arguably greater in the market than in the political system. Although there are plenty of situations in which the market itself is suspect on both efficiency and distributive justice grounds, there are certainly many circumstances in which the only good explanations for regulation lie in the political power of those who tend to benefit from regulation. An analysis of the comparative advantages of highly regulated versus relatively unregulated markets is beyond the scope of

raise prices to the general public, its goal is not to subsidize one group at the expense of another. Rather, its goal is to increase overall social welfare. Of course, it is often difficult to distinguish one category of legislation from the other, and skillful legislators can convince members of the public that redistributive legislation is actually for their benefit. See Macey, *supra* note 49, at 232 & nn. 46-47 (discussing possibility that environmental regulation actually subsidizes powerful interest groups). I recognize that the distinction is not perfect and may ultimately collapse because there are many situations in which regulation, such as health and safety regulation, is a hidden subsidy to an interest group, such as the providers of health and safety products or services or to the company in the market with a better product or service from the health and safety perspective.

86. Under a program commonly referred to as "e-rate," legislation requires that phone companies subsidize the use of the internet in public libraries and schools. The FCC required phone companies to charge a fee to implement the subsidy but prohibited phone companies from identifying the fee as FCC-imposed. Mike Krause, *Secret Tax on Your Telephone*, INDEPENDENCE INST., May 2, 2000 ("You won't see a federal e-rate tax on your phone bill because the Federal Communications Commission won't allow it."), at <http://www.i2i.org/SuptDocs/OpEdArcv/-2000/PhoneSubsidies.htm>; Kennard *Outlines Plans for E-Rate Changes*, COMMS. DAILY, June 11, 1998 ("Sen. Ashcroft (R-Mo.) said e-rate program was tax that FCC attempted to keep 'hidden from the American people.'"). The FCC's view was that carriers were misleading their customers because although carriers were required to subsidize e-rate institutions and also pay for other aspects of phone services through a portion of charges collected, the method of funding the program was at the option of the carrier. Therefore, it was misleading to characterize any fee added to the telephone bill as "FCC mandated." First Report and Order and Further Notice of Proposed Rulemaking, Truth-in-Billing and Billing Format, 14 FCC REC. 7492, FCC 99-72, CC Docket 98-170 ¶ 51 (released May 11, 1999); see also Jon Van, *Ameritech Takes Some of Mystery Out of Bills*, CHI. TRIB., Apr. 16, 1999, at 1 (referring to federal access charges).

this article, but the issue certainly should be taken into account when evaluating whether changes in the degree and nature of political accountability due to deregulation are something to worry about.

2. *Cooperative Government*

Another related set of phenomena that do not fit neatly into any of our privatization categories, but which most closely resemble deregulation, is what I call cooperative and market-based governance. This category includes regulatory strategies such as the move away from command and control regulation to performance standards, marketization of regulation which combines performance standards with tradable regulatory credits such as pollution credits, cooperative regulatory strategies in which agencies work with the regulated industries to develop optimal regulatory strategies, and negotiated rulemaking. Each of these recent developments presents interesting accountability considerations.

Moving from command and control regulation to performance-based standards privatizes the decision of what constitutes the best strategy for meeting regulatory requirements. The government no longer chooses the only method of meeting the regulatory goal. It is difficult to see any accountability concern here, apart from the obvious agency concern that compliance with performance standards may be more difficult to monitor than command and control.

Marketization of regulation gives a company an incentive to improve regulatory performance by allowing trading of credits earned through regulatory compliance. For example, a power generating company would be given an incentive to improve performance in pollution control by being allowed to sell the right to pollute, within limits set by the agency or by statute, when it reduces pollution below regulatory limits. To the extent trading is allowed, and within the limits set by the agency or by statute, this privatizes the decision of who will pollute and to what extent, when compared with command and control regulation of each individual pollution source. Again, monitoring difficulties are the most significant political accountability issue raised by this sort of regulatory reform.

Interests favoring stringent regulation are suspicious of reforms aimed at reducing the command and control aspects of regulation and allowing things like pollution credits to be bought and sold on the market. These reforms are attacked as methods for reducing the effectiveness of regulation by making it difficult to detect regulatory violations and eliminating the benefits of increased compli-

ance.⁸⁷ Insofar as it is difficult for the body politic to know whether the proponents of stricter regulation are correct in their charges, political accountability is made more difficult simply because obfuscation by those with political power is possible.

Cooperative regulatory strategies have been written about extensively by Jody Freeman.⁸⁸ Under these programs, agencies work closely with regulated parties to develop strategies to reach regulatory goals. This cooperation, which occurs mainly at the enforcement stage, also may lead to better understanding of the goals themselves, thus increasing the overall effectiveness of regulation. Cooperative regulatory strategies allow for greater input by regulated parties into agency enforcement activity, thus opening the process to outside influence at least a bit. However, it may help to further shut out interested third parties, who already may find it very difficult to have influence at the enforcement stage.

Negotiated rulemaking allows the agency, regulated parties, and interested third parties to negotiate together before the agency settles on a rulemaking proposal. The negotiation precedes the normal notice and comment process that most agency rules must go through to become law. The aims of negotiated rulemaking are: (1) to improve rules by getting input from all sides in a better format than comments on proposed rules; (2) to make post-rulemaking challenges less likely because most, if not all, interested parties have agreed to the rules in advance; and (3) to ease enforcement by making cooperation post-rulemaking more likely. From an accountability standpoint, there is some concern that the negotiations simply will degenerate into horse trading among interested parties who may ignore the overall public interest. Accountability is protected by Congress's rejection of proposals for secrecy in the Negotiated Rulemaking Act, and the requirement that negotiated rules still go through the notice and comment process, but the negotiation process still may excite suspicion from those not involved in the negotiations.⁸⁹

87. See generally Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 104-15 (2001) (describing and evaluating new regulatory strategies).

88. See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

89. Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561-70 (1994); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 579-80 (3d ed. 1998) (offering a description of the secrecy proposal and Congress's rejection of it).

With all regulatory programs that increase cooperation between interested parties and government, especially those focused only on the relationship between government and the regulated parties, there is a danger of agency capture. Too much cooperation between government and regulated parties could lead to unhealthy relationships in which both regulated parties and government officials gain at the expense of the public interest. Programs that increase the complexity of monitoring for regulatory compliance present the same danger, although government officials also could use uncertainty as an excuse for even stricter regulation if that would result in gains to those officials. Thus, although the positive potential in the reforms outlined above is clear, concerns for political accountability should lead, at least, to caution.

3. Vouchers

Vouchers present interesting political accountability issues. The most widely discussed voucher issue over the past several years is education, in which a strong movement advocates giving parents of school-aged children vouchers they can use toward tuition at either public or private schools.⁹⁰ The idea would be to create more of a market in elementary and secondary education, because vouchers would enable more people to afford private education.

There is a perception that at least some public school systems, not facing much in the way of market competition, spend inordinate amounts of money on administration and neglect education.⁹¹ Further, public schools may be hampered by powerful teachers unions that bargain for seniority systems and work rules that reduce flexibility in ways that harm education.⁹² Of course, teachers may tell a different story, blaming the failings of public schools on overcrowded classrooms, inadequate support, and social problems in the communities they serve. These two sets of factors, combined with tax reduction movements that have left schools with what they claim is inadequate funding to keep pace with the changing educational needs of public school students, have made public schools a

90. David Boaz, CATO Inst., *Let the Children Go*, Mar. 22, 1999 (defining voucher plans), <http://www.cato.org/dailys/03-22-99.html>.

91. See, e.g., Meredith May & Janine DeFao, *Oakland Team on Education Wraps Up Proposals*, S.F. CHRON., Oct. 8, 1999, at A21 (discussing school reform proposals in Oakland).

92. See, e.g., Brian McGrory, *Kerry Set to Propose Ending Tenure System*, BOSTON GLOBE, June 16, 1998, at A1 (discussing proposal to end teacher tenure system in public schools that is part of school system's contract with teachers unions).

prime target for privatization advocates.⁹³ Tuition vouchers are a method for accomplishing that privatization. Voucher advocates argue that were public schools forced to compete for students, they either would have to perform to the standard of private competitors, or they would wither away. There always has been some competition with private schools for students, but the public schools cost much less and are the only affordable choice for some students.

Tuition vouchers in primary and secondary education in all likelihood would lead to greater privatization, because at the margin more people could afford and would choose private schools. The arguments over these vouchers are similar to arguments concerning privatization in other contexts. For example, in addition to interests representing poorer parents who are concerned that the public schools will lose support in a voucher system, the biggest interest group that has opposed vouchers is teachers who fear the consequences vouchers will have on their jobs and working conditions.⁹⁴ Interests concerned about supporting religious education with public funds also have opposed tuition vouchers because many private schools are religious and would not be subject to the prohibition on religious education that exists for public schools.⁹⁵ Private schools, like other private entities, may not pay as much as public schools and may not provide the highly rule-bound, structured work environment that public schools provide. Even with similar laws in place, there is a perception that labor laws and contracts are not enforced with the same zeal in the private sector as they are in the public sector.⁹⁶

Tuition vouchers are viewed as a method for improving the public schools because, for lack of competition or some other reason or combination of reasons, the traditional lines of government accountability have not succeeded in a significant number of public schools in maintaining high quality programs. In many jurisdic-

93. See, e.g., Edward Wyatt, *4 Companies Emerge in Bid to Privatize Worst Schools*, N.Y. TIMES, Oct. 19, 2000, at B8 (discussing for-profit companies taking over public schools).

94. See generally, Press Statement, Statement of UFT President Randi Weingarten, United Federation of Teachers (Aug. 28, 2000) (arguing that vouchers are a poor solution to the problems facing public schools), http://www.uft.org/news.cfm?doc_id=1200.

95. See David Webber, Editorial, *Public Funding for Religious Schooling is a Part of America's Past*, ST. LOUIS POST-DISPATCH, Oct. 24, 2000, at D9 ("A frequent argument of opponents is that establishing tuition vouchers amounts to aiding religion and is, therefore, unconstitutional.").

96. See *supra* notes 55-57 and accompanying text.

tions, management of the schools is overseen by an independently elected school board, which acts like a board of directors and hires a superintendent, who acts like a chief executive officer.

Private schools receiving government funded tuition vouchers would be more difficult to control through the political system than public schools. However, it is likely that governments giving vouchers would impose substantive and reporting requirements on private schools accepting vouchers. School board, and thus political, control over school curricula and other program details would be reduced, as of course would political control over other structural and labor matters. The body politic would have to decide whether political accountability is worth losing in favor of increased market accountability that might lead to better quality and, ultimately, more responsiveness to the popular will.

Vouchers have been used widely in other government benefits contexts, sometimes with a privatization connection and sometimes without. There are at least three prominent voucher programs in the welfare area: Food Stamps, WIC coupons, and Section 8 housing vouchers.⁹⁷ Recipients of Food Stamps and WIC coupons must use them to purchase food.⁹⁸ Section 8 vouchers require benefits recipients to use the vouchers for housing.⁹⁹ Although there is no great tradition in this country of direct government provision of food to benefits recipients, there has been and still is plenty of public housing in this country. Thus, the Section 8 voucher program can be viewed as a privatized system of public housing, in which government pays the rent, but private, regulated, landlords provide the housing.

Contrary to the freedom-enhancing intent of tuition voucher programs, welfare vouchers are an attempt to retain political accountability over the welfare recipient's use of benefits. Vouchers, as opposed to pure cash grants, are designed to increase accountability and decrease private decision-making. The welfare recipient must use a portion of the benefits exclusively for food or housing. It is usually a crime to use such vouchers for other purposes or to trade them for cash.¹⁰⁰ Food Stamps and WIC coupons come with tight controls over the kinds of foods that can be purchased. Gov-

97. 7 U.S.C. §§ 2011-2032 (1994) (establishing Food Stamps program); 42 U.S.C. § 1786 (1994) (creating WIC (women, infants, and children) program); 42 U.S.C. § 1437f(o) (authorizing Section 8 housing program).

98. 7 U.S.C. § 2016; 42 U.S.C. § 1786.

99. 42 U.S.C. § 1437f(o).

100. *See* 7 U.S.C. § 2024(b) (1994).

ernment agencies control even minor details, such as whether a WIC coupon can be used to purchase flavored milk or only unflavored milk.¹⁰¹ In situations in which direct government provision of a good or service is not a realistic or likely alternative, a voucher increases political accountability by giving government control over choices made by private individuals.

Although political accountability may help explain welfare vouchers for food, the political realities may not appear all that positive. For one, the paternalistic impulse that leads to restrictions on the use of welfare creates the image of a “Big Brother” government making sure that people spend their welfare in the grocery store and not the liquor store. Further, the politics of welfare are quite interesting. Public choice scholars sometimes have difficulty explaining why welfare programs for poor people are enacted, since the poor do not appear to be obvious candidates for having the ability to organize and the power to influence government. They may be numerous enough to carry voting power in some jurisdictions, but they often are not as likely to vote as their wealthier counterparts. However, the existence of organized interests in the food production industries may explain the existence of the Food Stamp and WIC voucher programs. The Food Stamp program, for example, is administered by the Department of Agriculture, not Health and Human Services—the agency one would think would have primary jurisdiction over welfare programs.¹⁰² Although any welfare program for the poor is likely to increase spending on food, vouchers that are restricted to food purchases ensure that a certain amount of government money goes toward food rather than other possible uses that welfare recipients might prefer.

Housing vouchers function more like tuition vouchers because they rely on a private alternative even though a government institution providing the same service may exist. One reason for the existence of housing vouchers is that the supply of publicly owned low income housing is inadequate. Public housing, in some places, has suffered from problems that plague government attempts to provide goods or services without real competition or sufficient accountability for managers—mismanagement, inflated costs, and

101. See *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985) (addressing procedural validity of rulemaking process that resulted in removal of flavored milk from the list of permissible foods for the WIC program).

102. See 7 U.S.C. § 2012(l) (1994) (defining “secretary” as used in statute to be the Secretary of Agriculture).

corruption.¹⁰³ Housing vouchers allow housing benefit recipients to live in privately owned housing where landlords may be in competition for tenants. However, this competition may be more theoretical than real, because the need for housing benefits may be due to an inordinately tight or expensive private housing market. The problems of quality and supply that exist for voucher tenants may be similar to problems suffered in the purely private market, especially by tenants at the lower end of the economic spectrum. Public housing may suffer from poor management common to government-run institutions where market discipline is lacking and accountability to the public is not nearly as strong as private accountability to shareholders. If political accountability is not sufficient to ensure high quality public housing at a reasonable cost, then perhaps market competition, in the form of vouchers, could help.

D. Tax Reductions and User Fees

Cass's final category of privatization is tax reductions and user fees, both allowing private parties more choice about the use of money than if taxes were not reduced or if user fees were not imposed. Tax reductions are the bluntest form of privatization since they involve decreasing the share of the economy captured by the government without regard to the particular programs that would be cut or the particular uses to which the money would be put. User fees privatize decision-making in that they permit private parties to decide how much of a government good or service to use (and thus how much should be provided) based on whether the good or service is worth the cost imposed by the user fee.

1. Tax Reductions

There may be nothing original to be said about tax reductions and political accountability. Obviously, the ability of the political system to influence the use of money is reduced if taxes are reduced. The whole point of a tax reduction is to take consumption decisions away from government and put them in private hands. A person enjoying a tax reduction is unlikely to complain that she has lost the ability to politically control the use of her money since she has been given complete direct control.

103. See generally Don Terry, *Former Housing Chief Blames Woes on Feds*, SAN DIEGO UNION-TRIB., Aug. 6, 1995, at H15; Serge F. Kovaleski, *D.C. May Write Off More Rents; Housing Agency's Losses Would Grow by \$5.8 Million*, WASH. POST, May 15, 1994, at A1.

This does not mean, of course, that no one opposes tax decreases. A heavy consumer of government services, such as a parent of school aged children or a daily user of public mass transit, may fear that a tax decrease will lead to lowered government services and thus would prefer to pay higher taxes to support those programs. The poor may approve of increased taxes on the rich. Putting ideological preferences aside, one would expect opposition to tax decreases when it is someone else's taxes that are being decreased or when the gain from the tax decrease is perceived as less than the loss from reduced services.

One political accountability matter that can be raised by the overall level of taxation is the problem of overspending. There have been periods of deficit spending by government in which, in effect, the current generation finances consumption through borrowing that appears likely to be paid off only by future generations. A tax reduction could be a rational decision by current taxpayers to reduce their share at the expense of future taxpayers. However, it may be that the borrowing is for long-term capital projects that will benefit future generations, and borrowing also could strengthen the economy in ways that will benefit future generations albeit less tangibly than would capital projects. Nonetheless, it is not an original observation to point out that the inability of future generations to influence today's political decisions can skew decision-making against the interests of future generations.

There are factors that ameliorate this problem. The size of the deficit became, in recent times, a political issue to current taxpayers, perhaps because it got so big that government interest payments hampered flexibility in government spending, and higher market interest rates caused by government borrowing were hurting current taxpayers.¹⁰⁴ Perhaps current taxpayers recognized that consumption at the expense of future generations was morally questionable. While President Clinton expressed concern over eliminating the deficit too quickly, he was happy to take credit when a strong economy led to surpluses in federal funds rather than deficits.¹⁰⁵ It remains to be seen whether deficits will return when the economy sours or whether political concern over deficits

104. See, e.g., Eamonn Fingleton, *Unsustainable*, 11 AM. PROSPECT 1821 (2000).

105. See Richard Rahn, *Who Gave Us the Surplus*, WASH. TIMES, Oct. 24, 2000, at A14 (discussing President Clinton taking credit for the surplus); Weekly Compilation of Presidential Documents 1139, 95 WL 15155290, July 3, 1995 (Speech by President Clinton cautioning against too rapid reduction of deficit).

hinders borrowing for long-term capital projects the cost of which ought to be shared by future generations.

2. *User Fees*

User fees are a fascinating subject for study, because they can raise fundamental issues about the role of government. User fees are ubiquitous, and most are accepted without much thought. We pay for our driver's licenses, our passports, licenses for our pets, postage stamps, fares for government-owned mass transit, copies of birth, marriage, and death certificates, and numerous other government goods and services. Some fees are very controversial, and it is interesting to contemplate the appropriate circumstances for imposing user fees, as opposed to providing government services without charge.

User fees tend to privatize the decision of whether government should provide a particular good or service because the good or service will not be provided unless it is worth it to the consumer to pay the user fee.¹⁰⁶ This is often preferable to general taxation and use of government funds to provide goods and services without user fees, especially where the beneficiaries of the goods or services are users who can afford a fee and who might choose alternatives if they were forced to pay.

User fees are thought to introduce a measure of efficiency into the operation of government, because, assuming some measure of accuracy in pricing, they ensure that government goods and services are not overconsumed simply because they are available for free or at too low a price. Although efficient pricing is a laudable goal, some user fees appear to be imposed simply because government can do so and the group upon whom the fee is imposed cannot use the political process to resist them. For example, defendants in criminal cases are often assessed court costs as part of the disposition of their cases. The Immigration and Naturalization Service imposes user fees for entering the United States and for other services it provides,¹⁰⁷ and user fees in the form of higher telephone rates are imposed by some states on calls by prisoners.¹⁰⁸

106. This description of user fees as privatizing choice is drawn from Cass, *supra* note 8, at 461.

107. See 8 C.F.R. § 103.7 (2000). For a schedule of fees in table form, see Immigration and Naturalization Serv., *Forms and Fees*, at <http://www.ins.gov/-graphics/form-fee/forms/index.htm> (last modified Mar 14, 2001).

108. Collect calls made from prisons are charged at a higher rate than other collect calls, with the telephone company and the government sharing the extra revenue. See Jeremy Kohler, *Boycott Highlights High Fees Paid By Inmates' Families for Long Dis-*

The groups on whom these fees are assessed may have difficulty organizing against them within the political process.¹⁰⁹ It is unclear whether these fees are motivated by a desire to rationalize consumption or are simply revenue raising measures where there appears to be an easy source of revenue.

Consider further examples of user fees. Public schools do not charge tuition for residents of the school district, although they may accept tuition-paying students from outside the district, and they often charge user fees for extracurricular activities such as sports teams, drama groups, and the like. Municipally-owned recreational facilities, such as golf courses, swimming pools, and beaches charge user fees, though other recreational facilities, such as parks, do not. Some targeted taxes, such as the excise tax on gasoline, are more accurately thought of as user fees since they are earmarked for highway funding. Highway tolls are also user fees. Although it may be very efficient to target the users of a particular road for the costs of building and maintaining the road, the transaction costs of imposing tolls may not be worth the gains in efficiency.¹¹⁰

User fees potentially are subject to abuse. User fees may be implemented in order to impose cross-subsidization; rates are sometimes set in regulated industries in which uniform rates often result in subsidies to customers whose service is relatively expensive to

tance Calls: Missouri Will End Payments to State in Next Contract, ST. LOUIS POST DISPATCH, Aug. 11, 2000, at A1; Cathy Woodruff, *Vote Set for Jail Phone Contract*, TIMES UNION (Albany, NY), Sept. 6, 2000, at B1 (describing \$1.30 surcharge on county jail inmates' collect calls which funds a forty-nine percent commission on calls that goes to county; county claims that the surcharge and commission do not affect the rates charged).

109. An organization, Citizens United for the Rehabilitation of Errants, organized a month-long national boycott of prison phones with surcharges, and the boycott apparently helped convince at least the Missouri legislature to end the practice. Kohler, *supra* note 108. The organization continues to campaign against surcharges on inmate telephone calls. See Citizens United for Rehabilitation of Errants, *Prisoners' Telephone Charges*, at <http://www.curenational.org/Position/curepo9.html>.

110. Stopping for tolls causes pollution, wastes time and fuel, and can be dangerous. For example, Connecticut removed the tolls from the Connecticut turnpike after a widely publicized fatal accident in which "a tractor-trailer slammed into a line of cars, killing seven people." Pat R. Gilbert, *Drivers May Pay a Price to Lose Tolls: More Traffic, Crashes and Trucks are Feared*, REC. (Bergen County, N.J.), Apr. 26, 1992, at A1. Further, when only some roads are toll roads, choices get distorted and people choose less desirable roads to avoid tolls, thus causing overcrowding on non-toll roads and under-utilization (from a purely traffic perspective) of toll roads. When tolls are removed, traffic increases, prompting fear of congestion and accidents, which appears to contradict the accident-reducing motivation for removing tolls in some cases. *Id.*

provide. The best example of this may be postal rates. It has long been argued by competitors of the United States Postal Service that first class postal rates are set at a level that far exceeds the average cost of delivering first class mail.¹¹¹ The surplus from first class postage is used, it is argued, to subsidize other services provided by the Postal Service such as parcel post and express mail¹¹² and even non-postal products and services.¹¹³ Unlike first class mail, over which the Postal Service has a monopoly, the Postal Service competes with private companies in other areas, and the companies complain that this renders the competition in areas where the Postal Service has surrendered its monopoly unfair.¹¹⁴ There is also a suggestion that the Postal Service uses some of the first class surplus to subsidize what many call junk mail, i.e., mail consisting of catalogs and sales offers. It may be socially desirable to subsidize such mailings, for the positive effects on commerce and communication. However, it is not at all clear that it makes sense to do this at the expense of first class mailers, as opposed to taxpayers generally. Although the high price of first class mail gives incen-

111. See Joseph W. Belluck, Note, *Increasing Citizen Participation in U.S. Postal Service Policy Making: A Model Act to Create a Post Office Consumer Action Group*, 42 BUFF. L. REV. 253, 254-55 (1994) (arguing that the average consumer pays inflated first class rates and receives poor service because commercial mailers and postal unions exert undue influence in the rate setting process). The Postal Rate Commission is required by statute to set postal rates for each class of mail to recover the costs of handling that class of mail. See 39 U.S.C. § 3622 (1994). There is often controversy over the allocation of these costs. *Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 833-34 (1983).

112. Mark Murray, *No Stamp of Approval for Postal Reform*, NAT'L J., Jan. 30, 1999, at 277 ("But many Postal Service competitors, such as Federal Express and UPS, have . . . complained for years that the Postal Service uses its billion-dollar monopoly of first-class mail to subsidize express mail, parcel post, and other services that compete with the services that private firms offer.").

113. Timothy Roche et al., *Who's Got Mail?*, TIME, Oct. 16, 2000, at 86 ("For years the Postal Service has been accused of using profits from its monopolistic first-class deliveries to subsidize loss-leading services such as prepaid phone cards that compete with private companies.").

114. The claim of subsidy is controversial because determining the proper market rate for first class mail is not a simple task. The Postal Service may enjoy a competitive advantage merely because the equipment and labor necessary to handle first class mail may, to an extent, reduce the marginal cost of providing other services. Forcing the Postal Service to include some of that equipment in its cost calculations for other services might result in unfairly increasing prices for other services and decreasing prices for first class mail, which might in turn unfairly disadvantage firms competing around the edges of the first class monopoly, such as messengers and other delivery services, fax machine manufacturers, and email equipment and service providers. Thus, the claim of subsidy, although intuitively attractive, may be more complex than it appears at first glance.

tives to find alternatives, such as faxing and email, the monopoly frustrates substitution at least to some extent.

I do not mean to suggest that third party effects should not be considered when user fees are imposed or set. Although some payers of user fees easily may be able to spread the costs to third parties enjoying benefits, there may be social benefits that can be more easily spread through a tax system than a system of user fees. For example, it may be that all local residents and businesses benefit from the existence of roads and mass transit, even if they do not use the roads or transit system themselves. Although it makes sense for users to pay part of the costs (through tolls, gasoline taxes, and fares) it may not make sense to attempt to collect all, or even nearly all, the costs through user fees if the users cannot spread the costs of the fees to other beneficiaries. Insofar as society benefits generally, it makes sense to finance an activity through more general taxes. For example, an argument against imposition of user fees on primary and secondary education is that there are significant third party benefits when the work force is educated, and it would be difficult for workers to recoup their educational costs from their employers, who would then recover the costs from customers.

It is unclear how user fees affect political accountability. Because government activities are, almost by definition, subject to accountability through the political process, whether those activities include user fees should not normally have large effects on political accountability. In some situations, financing government activities through user fees on consumers of government goods or services rather than through general revenues may help remedy a common problem of political accountability. The general public usually has little incentive to pay attention to what a large government like the United States government is doing with general revenues because the taxes paid by any particular person are unlikely to be affected even if unrest by taxpayers completely eliminated a government good or service. Beneficiaries, on the other hand, may have a strong incentive to lobby for a benefit, and if the beneficiaries are a small and cohesive group, they may succeed without regard to whether the benefit is politically acceptable generally or socially desirable.¹¹⁵ Even though some oversight, for example by a legislative committee, is theoretically possible, without anyone with an

115. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965) (describing characteristics of groups that are likely to be able to organize and procure benefits through the political process).

incentive to complain, under many circumstances it is unlikely that the political process effectively will check government provision of benefits.¹¹⁶ With user fees financing all or some of the provision of the government good or service, this element of political distortion is less of a problem.

User fees also can provide accountability by applying a measure of market discipline to government. If a governmental unit is required to finance its activities through user fees, and if there is competition or substitutes, the fees will be constrained by the price at which alternatives are available. The performance of the governmental unit can be judged by its ability to attract business and finance its activities with the fees imposed.

The imposition of user fees also may increase users' incentives to monitor government's performance. It may be that when a service is paid for the user feels a greater entitlement to competent, effective government than when a service appears free of charge. Since most people must realize that even "free" services are paid for through taxes, this should not be a great effect, but when user fees mimic payment for a good or service in the market, the effect may exist.

E. Government Corporations

The last form of privatization I discuss involves entities that are difficult to classify as either public or private. There are numerous government corporations performing various functions in which the lines of accountability are very unclear and the status of the entity as governmental or private is highly uncertain. Michael Froomkin has written an extensive article on this subject,¹¹⁷ and I do not mean to repeat his analysis here, but I hope to shed some light on the issue from a privatization and political accountability perspective. If agencies are a headless fourth branch of government, then perhaps federal government corporations are a fifth.

I suspect that most people have heard of at least a few federal government corporations, such as Amtrak, Fannie Mae, Ginnie Mae, Freddie Mac, the Resolution Trust Corporation, the Corporation for Public Broadcasting, the Legal Services Corporation, and one that has been in the news recently due to President Bush's focus on faith-based organizations, the Corporation for National

116. This is the public choice dilemma.

117. See Froomkin, *supra* note 9 (analyzing federal government corporations and their character as both public and private entities).

and Community Service.¹¹⁸ These are corporations owned wholly or in part by the federal government.

For some reason or set of reasons, the federal government has found it desirable to conduct some of its business in the corporate form.¹¹⁹ Perhaps the corporate form is more convenient when the government participates in financial or other markets. Perhaps the corporate form allows federal expenditures to not appear on the federal budget, or shields funds of the government corporation from potential use by other government agencies. However, the government's use of the corporate form raises questions. Are there limits to the choice of the corporate form? To return to an earlier example,¹²⁰ is there any reason why, assuming the Appointments Clause and other concerns were met, the federal government could not create EPA, Inc., a government corporation, to administer federal environmental law?

When the federal government sells goods or services on the market, the corporate form may be desirable, especially if there is a possibility that the corporate entity might someday be privatized. Amtrak, the common name for the National Railroad Passenger Corporation, was established by federal legislation as a for-profit corporation under the District of Columbia's corporate law.¹²¹ Congress explicitly provided that Amtrak is not an agency or establishment of the federal government. However, by statute the President appoints six members of Amtrak's board of directors, and because of ongoing government subsidies, the secretary of transportation appoints two board members.¹²² The final board member is appointed by the other eight.¹²³ If Amtrak were to become profitable and no longer need government subsidies, perhaps the federal government would sell its stock in Amtrak. The corporate

118. Although the corporation's official name is the Corporation for National and Community Service, it commonly uses a shortened version, the Corporation for National Service. *E.g.*, *Corporation for National Service*, at <http://www.cns.gov>.

119. See Froomkin, *supra* note 9, at 557-59 (discussing reasons that government forms government corporations).

120. See *supra* note 23 and accompanying text.

121. Beermann, *supra* note 6, at 177.

122. *Id.*

123. *Id.* Appointments Clause issues with regard to the appointment of Amtrak's board members are similar to those raised above, *supra* Part I.A. If Amtrak is not a government entity, it is unclear what constitutional provision authorizes appointment by the President or the Secretary of Transportation. On the other hand, if the board members are officers of the United States, then there is no authority for appointment of the final director by the other eight, because Amtrak is unlikely to be considered a department of government and the directors are thus not likely to be considered heads of a department.

form would ease Amtrak's transformation into a purely private entity.

Government corporations also are used commonly in financial matters, such as facilitating home mortgage financing. Although several federal government corporations are involved in this market, I focus here on the Federal Home Loan Mortgage Corporation, commonly known as Freddie Mac.¹²⁴ Freddie Mac purchases home mortgages, pools them, and securitizes them, selling shares in the pools on the open market.¹²⁵ This helps finance home mortgages, since mortgagees can sell the mortgages and use the funds from the sales to write more mortgage loans.

Freddie Mac was established by federal statute to advance the federal government's interests in a stable secondary market for home mortgages and to further the availability of mortgage financing, including for low and moderate income housing.¹²⁶ In addition to establishing Freddie Mac as a corporation, Congress statutorily prescribed Freddie Mac's powers, granted Freddie Mac immunity from state and local taxation (except for real property taxes), and provided that for purposes of federal court jurisdiction, Freddie Mac should be considered a federal agency and all cases to which Freddie Mac is a party are deemed to arise under federal law.¹²⁷

Freddie Mac functions largely like a private corporation. It has issued stock to the public, and Freddie Mac stock is traded on the New York Stock Exchange under the symbol FRE. It has, however, a continuing connection to the federal government. Its board of directors has eighteen members, five of which are appointed by the President, apparently without the advice and consent of the Senate.¹²⁸ Further, the statute creating Freddie Mac grants the President the power to remove the directors he appoints "for good cause."¹²⁹

Arguably, the President should not have the sole power to appoint or remove Freddie Mac directors unless they are inferior officers of the United States.¹³⁰ They cannot be principal officers

124. See 12 U.S.C. §§ 1451-59 (1994).

125. *Id.*

126. *Id.* § 1451 note (Short Title and Statement of Purpose).

127. *Id.* § 1452(f).

128. *Id.* § 1452(a).

129. *Id.* § 1452(a)(2)(B).

130. As Professor Michael Froomkin points out, the Supreme Court has long approved presidential appointment of directors to private corporations in which the government has an interest. Froomkin, *supra* note 9, at 574 n.156 (discussing the Court's longstanding approval of presidential appointments of directors of the Bank of the United States).

because then senatorial confirmation would be required.¹³¹ If the directors are not officers, it is difficult to imagine what power the President would have to appoint them. Removal is even trickier. I find it very suspicious for the President to have the power to remove a director of a private company. It is not a question of the President stepping on the toes of another branch of government, which is often an issue in separation of powers questions, but rather a question of *ultra vires*, i.e., whether the President has the power to appoint and remove directors of federally chartered private corporations.

Perhaps strong evidence that the President has such power lies in historical evidence, dating to entities like the Bank of the United States and even back to the colonial period in which the King of England appointed colonial officials who governed the colonies by heading up what may be best characterized as government corporations.¹³² Because questions like what powers are included as proper Presidential powers are difficult to answer conceptually, historical practice is often a good guide on what powers were granted in the Constitution. If historically the President and even the King of England have made appointments to government corporations, or privately owned corporations chartered to perform government functions, then perhaps the executive power granted in the Constitution should be understood to continue the tradition.

Interestingly, the courts have not been sympathetic to arguments that Freddie Mac is a government agency, at least when the issue is whether Freddie Mac is subject to constraints on government action. The Ninth Circuit has held that Freddie Mac is not a government entity for the purposes of applying the Due Process Clause to Freddie Mac's dealings with sellers and servicers of mortgage loans.¹³³ The court relied primarily on the fact that the President could appoint only a minority of Freddie Mac's directors, which was insufficient to give the federal government control over Freddie Mac.¹³⁴ The court distinguished Freddie Mac from Amtrak,¹³⁵

131. See U.S. CONST. art. II, § 2, cl. 2.

132. The first Congress created at least one government corporation, the Bank of the United States. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (discussing constitutionality of Bank of the United States). It may be, although I am not certain, that entities like the Massachusetts Bay Colony are even earlier examples of government corporations, private companies exercising powers, some of which may have been governmental in nature, granted by the sovereign.

133. See *Am. Bankers Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 75 F.3d 1401, 1409 (9th Cir. 1996).

134. *Id.* at 1407.

135. *Id.* at 1407-08.

which the Supreme Court held to be a state actor for First Amendment purposes because all but one of Amtrak's board members are appointed by federal government officials.¹³⁶ The Seventh Circuit denied a claim against Freddie Mac under the Federal Tort Claims Act¹³⁷ on the ground that Freddie Mac is not an agency of the federal government,¹³⁸ although it did hold that Freddie Mac was protected from estoppel under doctrines that hold government agencies not subject to estoppel by the representations of their agents.¹³⁹

The structure and ownership of federal government corporations varies widely. On one extreme, the Corporation for National and Community Service, from an accountability standpoint, appears to be indistinguishable from a government agency except that it is in the corporate form.¹⁴⁰ The structure and powers of the corporation are prescribed by legislation, and the directors and CEO of the corporation are appointed by the President with the advice and consent of the Senate.¹⁴¹ The corporation's directors and CEO must be legally considered "Officers of the United States" or the Senate's role in confirming appointments would be subject to constitutional challenge because the only basis for senatorial action without bicameralism and presentment is the Senate's constitutional role in confirming the appointments of such officers.¹⁴² Unilateral action by the Senate with effects outside the Senate itself is unconstitutional unless specifically authorized by the Constitution.¹⁴³

The legal and constitutional status of other federal government corporations is not so clear. For example, the Federal Reserve System has a great deal of power over monetary policy in the United States. The system is a mixture of what look like government agencies (the members of the Board of Governors of the Federal Reserve System are appointed by the President with the advice and consent of the Senate) and private entities (the directors of the Federal Reserve Banks are chosen by member banks, which also

136. See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995).

137. 28 U.S.C. §§ 2671-2680 (1994).

138. See *Mendrala v. Crown Mortgage Co.*, 955 F.2d 1132, 1140-41 (7th Cir. 1992).

139. *Id.* at 1139.

140. See 42 U.S.C. § 12651 (1994) (establishing the Corporation for National and Community Service). Interestingly, the term "Executive Agency" is defined in the United States Code to include "an Executive Department, a Government corporation, and an independent establishment." 5 U.S.C. § 105 (1994).

141. 42 U.S.C.S. § 12651c, 12651e (2001).

142. See U.S. CONST. art. II, § 2, cl. 2.

143. See *INS v. Chadha*, 462 U.S. 919, 955 (1983).

own shares in the Federal Reserve Banks).¹⁴⁴ Membership on the Federal Open Market Committee, an important committee in setting monetary policy, is selected in part by the Boards of the Federal Reserve Banks, which in effect means that private entities are choosing members of what looks like a government body.¹⁴⁵ This arrangement raises grave doubts under the Appointments Clause¹⁴⁶ and perhaps also under nondelegation doctrine principles. If the members of the committee are officers of the United States, they can be selected only in compliance with the Appointments Clause which would not allow appointment by private entities such as banks. If they are not officers of the United States, then the appointment of some members by the President with senatorial confirmation, even indirectly by virtue of their service on the Board of Governors, is subject to constitutional attack as, at a minimum, beyond the Senate's confirmation power. Nondelegation principles also call into question allowing an entity that is at least partly privately controlled to decide important matters of federal government policy.

Regardless of the legal issues raised by these sorts of arrangements, the appearance and reality of political accountability are placed in doubt when government power is wielded by entities that are either outside government or only loosely connected to government.¹⁴⁷ The Federal Reserve System may be the best example of this, because in recent years the Chairman of the Federal Reserve System, Alan Greenspan, has appeared to function independently of the rest of government, steering the economy away from the depths of recession and the shoals of inflation. The Chairman is appointed pursuant to the Appointments Clause, so perhaps his perceived lack of accountability is a function of the independence of his agency and his insulation from Presidential removal, but the structure of the Federal Reserve System, with its public/private

144. 12 U.S.C. § 304 (1994).

145. Five of the twelve members of the committee are selected by the Federal Reserve Banks. The other committee members are the Members of the Board of Governors of the Federal Reserve System, who are appointed by the president and confirmed by the Senate. 12 U.S.C. § 263(a) (1994).

146. *See Melcher v. Fed. Open Mkt. Comm.*, 836 F.2d 561, 562 (D.C. Cir. 1987) (holding that equitable discretion counsels against hearing United States Senator's challenge to appointment by Federal Reserve Banks of members of the Federal Open Market Committee).

147. *See, e.g., Melcher v. Fed. Open Mkt. Comm.*, 644 F. Supp. 510, 521 (D.D.C. 1986) (stating that selection of members of Federal Reserve Board's Federal Open Market Committee by private individuals did not violate Appointments Clause), *aff'd in part and vacated in part on other grounds*, 836 F.2d 561 (D.C. Cir. 1987).

partnership appears to have at least something to do with the Chairman's unique status in the political system.

Whatever their virtues, government corporations appear to create significant questions of accountability. Their connection to government can be mysterious, and their loyalties mixed if both government and shareholders participate in their governance by choosing directors and officers. A public unhappy, for example, with Freddie Mac or Fannie Mae is likely to have no idea whom to hold responsible. It may not even be obvious who is making which decisions. The inability to assign political responsibility for the actions of government corporations is often likely to be much greater than that caused by commandeering of state and local government by the federal government. Yet we have no developed vocabulary for discussing whether a particular function is appropriate for the corporate form or whether it should be performed, if at all, by an actual government agency.

III. FOIA AND THE APA

The last set of issues I look at involve the applicability of the Freedom of Information Act ("FOIA")¹⁴⁸ and related statutes¹⁴⁹ and the Administrative Procedure Act ("APA")¹⁵⁰ to the activities of entities involved in privatization. Recall that the three criteria for political accountability put forward at the outset of this article are: (1) the body politic's ability to influence a governmental decision, (2) the body politic's ability to know which entity in the political system is responsible for an action or policy, and (3) the ability of the body politic to obtain information about a decision or action.

Application of FOIA and the APA to an activity enhances accountability along all three measures. The APA and FOIA require agencies to publish certain of their decisions in the *Federal Register* and give the public the right to gain access to many agency records.¹⁵¹ In accountability terms, FOIA most directly allows the body politic to gain information about the operation of government by requiring agencies to open many records to public inspection.

148. 5 U.S.C. § 552 (1994).

149. Related statutes include the Government in the Sunshine Act. *Id.* § 552b. In order to avoid needless complication, the discussion in the text is confined to FOIA.

150. *Id.* §§ 551-559.

151. Agencies must publish rules that affect the public in the *Federal Register*. *Id.* § 552(a)(1)(D). A rule not properly published may not be used against a person lacking actual notice of the rule. *Id.* § 552. Agencies are also required to "make available for public inspection and copying" final opinions and orders in adjudications. *Id.* § 552(2)(A).

tion. FOIA furthers additional accountability interests because the information made public under FOIA can be used to facilitate efforts to influence government decision-making and to identify which government entity is responsible for a particular action or decision.

The APA increases the body politic's ability to influence government action in rulemaking by providing for an open, somewhat political, rulemaking process. By specifying procedures for both formal and informal adjudication,¹⁵² the APA also increases the ability of adjudicatory subjects to influence the outcome of their cases. Further, by subjecting rulemaking and adjudication to judicial review under various statutory standards of review,¹⁵³ the APA provides private parties a means of restraining agencies from acting without good reason or beyond their statutory authority. Finally, by requiring agencies to give notice of both adjudicatory and legislative action,¹⁵⁴ the APA provides the public with information about agency action, including which agency proposes to take what action. Armed with this information, influencing agency action becomes possible.

Privatization threatens to undermine the accountability provided by the APA and FOIA in several ways, some obvious and some not so obvious. Most obviously, insofar as a private entity is not subject to the APA or FOIA, the accountability advantages of those statutes are lost. For example, the records of a company administering a social welfare program might not be available to the public under FOIA because they would not be considered records of an agency,¹⁵⁵ and the directors of the private company would be able to meet in private, without regard to Sunshine Act requirements. Private companies developing rules of thumb for dealing with claims or other matters affecting the public might not have to publish those rules under the APA, and the lack of public access to their records and meetings might make it difficult for the public to even know of such rules' existence.

There are ways to maintain accountability in privatized situations. Agencies could require publication and openness, and courts might hold benefits denials invalid if, for instance, they are made

152. *See id.* §§ 552(a)(1)(B), 554, 555(e), 556-557.

153. *Id.* §§ 704, 706.

154. *Id.* §§ 552(a)(2)(A)-(B), 553.

155. *See* *Forsham v. Harris*, 445 U.S. 169, 171 (1980) (holding that data produced by private researchers in government funded study are not "agency records" subject to FOIA disclosure).

by a private contractor without publication by the agency of either the agency's rules or the contractor's rules. Perhaps courts should deem any rules (such as rules of thumb) developed by a private contractor to be rules of the agency and apply the APA's publication requirement.¹⁵⁶ Agencies also should provide clear instructions to private providers of government benefits, and should not allow the private companies to make discretionary decisions that, if made by an agency, would be subject to the APA and FOIA's accountability enhancing procedures. Thus, it is possible to maintain accountability in a privatized situation, but the process of accountability is at a minimum made more difficult by the privatization.

However, privatization also may threaten accountability in ways that are not so obvious. Although an agency is obviously accountable for the decision to engage a private company to provide goods or services, agency rules and records surrounding what are essentially procurement decisions may be less open to public scrutiny and influence under FOIA and the APA than other agency policy decisions. Rules relating to agency management and contracts are not subject to the APA's rulemaking requirements.¹⁵⁷ Government contractors and agencies might be able to shield data submitted by contractors to agencies from FOIA disclosure as "confidential," "commercial or financial information."¹⁵⁸

The applicability of FOIA and the APA to government corporations and similar entities is worthy of separate attention. Congress sometimes specifies whether a particular government corporation should be considered an agency for the purposes of FOIA and the APA.¹⁵⁹ The statutory default rule is that a government corporation is subject to FOIA, even though it might not be subject to the APA.¹⁶⁰ Thus, even though entities like Freddie Mac discussed *supra* may not be subject to constitutional constraints or the re-

156. The APA's publication requirement is the primary mechanism that applies to benefits-related rules since the APA's rulemaking provisions do not apply to rules regarding government benefits. *See* 5 U.S.C. § 553(a)(2).

157. Rules relating to "agency management . . . or to public property . . . or contracts" are not subject to the APA's rulemaking requirements. *Id.* § 553(a)(2).

158. *Id.* § 552(b)(4).

159. *See* Beermann, *supra* note 6, at 173, 176.

160. FOIA has a broader definition of "agency" than the APA. The APA defines agency as "each authority of the Government of the United States" with enumerated exceptions including Congress, the United States courts and territorial governments. 5 U.S.C. § 551(1) (1994). FOIA defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." *Id.* § 552(f).

quirements of the APA, they are subject to disclosure of records under FOIA.¹⁶¹

In sum, for a variety of reasons, privatization might render the APA and FOIA less effective in providing avenues for holding agencies accountable. Congress or the relevant agency should take care when contracting for the provision of goods and services to ensure that private contractors operate under clear instructions and do not exercise governmental discretion or coercive power without an adequate substitute for the accountability protections that apply to government. Perhaps Congress, and state legislatures, should consider subjecting the records of government contractors to FOIA-like disclosure obligations, at least when the contractor is providing benefits directly to members of the public.

CONCLUSION

"Privatization" denotes a broad spectrum of the relationship between government and the private sector. In some circumstances, such as government contracting out for support goods and services, accountability is not likely to be a serious concern, because government remains fully accountable for its procurement decisions regarding goods and services and because procurement decisions do not directly affect members of the public. In other circumstances, such as deregulation of personal relationships and business matters, reducing political accountability is the point of deregulation, and the increase in personal and economic freedom is worth the reduction of political accountability.

In recent years, attention has focused largely on contracting out by government of the provision of goods and services to the public, most notably with regard to social welfare and social insurance programs. One serious concern that has been raised with regard to this type of privatization is that private companies providing goods and services to the public are less politically accountable than the government agencies they replace. In general, if a private company is given detailed, comprehensive instructions by a government agency, and that agency remains accountable for the successes or failures of the private provider, the degree of political accountability lost may be worth the gains in market accountability

161. See *Rocap v. Indiek*, 539 F.2d 174, 181 (D.C. Cir. 1976) (concluding that Freddie Mac is subject to FOIA as a government controlled corporation); *Energy Research Found. v. Def. Nuclear Facilities Safety Bd.*, 917 F.2d 581, 585 (D.C. Cir. 1990) (finding that Defense Nuclear Facilities Safety Board is subject to FOIA and Sunshine Act).

that competition over government contracts brings. If, however, the private provider is not given detailed comprehensive instructions, but rather exercises discretion and coercive power over members of the public, accountability concerns may be well founded. Some reform, such as applying freedom of information principles or procedural requirements akin to those in the Administrative Procedure Act, could go a long way toward alleviating accountability concerns. It is important to look separately at each type of privatization, and even each instance of privatization, without lumping all privatizations together as positive or undesirable along ideological lines.

